U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 October 2005

CASE NO.: 2004-LHC-02737

OWCP NO.: 01-159379

In the Matter of

DANA J. CAVIGGIA
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

Appearances:

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for the Claimant

Edward W. Murphy (Morrison, Mahoney & Miller), Boston, Massachusetts, for Electric Boat Corporation

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

I. Statement of the Case

Dana J. Caviggia (the "Claimant") filed this claim for worker's compensation benefits against the Electric Boat Corporation ("EBC") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "LHWCA"). The Claimant alleges that after undergoing routine arthroscopic left knee surgery in August of 2001 for a work-related knee injury, he developed complications which were diagnosed as a malignant fibrous histiocytoma of the left tibia which required total knee replacement surgery in February of 2004 and multiple courses of chemotherapy. He claims that the cancer is causally related to the earlier knee injury and surgery, and he seeks an award of disability compensation for time lost from work as well as medical care and attorney's fees. EBC denies responsibility for the cancer and the resulting surgery and disability. After the parties were unable to arrive at a resolution during informal proceedings before the District Director of the Department of Labor's

Office of Workers' Compensation Programs ("OWCP"), the claim was referred to the Office of Administrative Law Judges ("OALJ") for formal hearing.

Pursuant to notice, a formal hearing was conducted before me in New London, Connecticut on March 30, 2005, at which time the Claimant appeared represented by counsel, and an appearance was made on behalf of EBC. The Claimant testified at the hearing, and documentary evidence was admitted as Claimant's Exhibits ("CX") 1-15 and 13-15 and EBC Exhibits ("EX") 1-24. Hearing Transcript ("TR") 11, 13. EBC's objection to CX 11 and 12 based on *Daubert v. Merrill Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) was taken under advisement. TR 10-11.[1] At the close of the hearing leave was granted to permit filing of post-hearing briefs which were timely submitted on behalf of both parties. The record is now closed.

After consideration of the evidence and the parties' positions, I conclude that the Claimant has failed to establish that his cancer, surgery and disability are causally related to his employment at EBC. Accordingly, his claim must be denied. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The parties offered the following stipulations at the hearing: (1) that the claim comes within the coverage of the LHWCA; (2) that the date of the claimed cancer injury is September 15, 2003; (3) there was an employer-employee relationship between EBC and the Claimant at the time of the claimed cancer injury; (4) EBC was timely notified of the claimed injury; (5) the claim was timely filed; (6) the notice of controversion was timely filed; (7) the informal conference was conducted on July 7, 2004; (8) the Claimant's average weekly wage at the time of the initial left knee injury on May 16, 2001 was $796.40; (9) the Claimant's average weekly wage at the time of the claimed cancer injury on September 15, 2003 was $963.45; (10) the Claimant was under a temporary total disability from September 16, 2003 through March 7, 2005; (11) the Claimant returned to his regular pre-injury job at EBC on March 7, 2005; and (12) during his first week back at EBC, March 7 to 14, 2005, the Claimant worked 20 hours. TR 14-17. The parties also agreed that that unresolved issues to be adjudicated are (1) whether the Claimant's knee cancer and resultant need for knee replacement surgery were causally related to his employment at EBC and (2) if disability compensation is awarded, whether the compensation rate should be based on the Claimant's average weekly wage at the time of the original knee injury in 2001 or the average weekly wage as of the September 15, 2003 cancer injury. TR 15-16. In addition, there is an issue regarding the admissibility of CX 11 and 12.

III. Findings of Fact and Conclusions of Law

A. Background

[1] At the hearing, I indicated to the parties that a ruling on EBC's *Daubert* objections would be made prior to the issuance of a decision on the merits of the claim. TR 11. However, both counsel were subsequently contacted regarding the necessity of a pre-decisional admissibility ruling, and they agreed that the ruling could be made in the decision on the merits.

The Claimant is a 53 year old who has worked for EBC since November of 1971. TR 22-23. He was hired as an Electronics Learner and currently is employed as a First Class Electronics Mechanic, installing electronics equipment aboard submarines. TR 23. On May 16, 2001, he was injured while working aboard a submarine when a wrench extension broke struck him on the inside of the left knee. TR 23-24. He developed swelling, sought medical attention and received a diagnosis of a torn meniscus cartilage for which he underwent surgery on August 6, 2001. TR 25-27. Following the surgery, the Claimant received a course of physical therapy. He testified that he had to take medication for constant pain in his knee prior to the physical therapy sessions, and he said that he believed that the pain was due to the fact that he had a tight knee joint which required forceful manipulation during surgery and which possibly caused a strained tendon resulting in tendonitis. TR 27-29. On December 21, 2001, the Claimant was released by his treating orthopedic surgeon, Jeffrey A. Salkin, M.D., to return to light duty work on October 29, 2001 and regular duty on December 10, 2001. CX 4 at 5-6. Although he was medically released to regular duty in December 2001, the Claimant testified that he still experienced difficulty walking for a full day, and he was accommodated by EBC placing him in a "shop" environment which limited his work aboard submarines to once or twice weekly. TR 30. The Claimant said that he continued to experience pain in the knee by the end of the workday between the end of 2001 and September of 2003, and he was able to feel a small bump close to a surgical scar on the inside of the knee. TR 30-31. He also said that this bump was located where he had received a cortisone injection from Dr. Salkin. TR 31.

On September 15, 2003, the Claimant's left knee gave out while working in EBC's antenna repair shop, and he struck the inside of the knee against the arm of a chair and immediately experienced excruciating pain. TR 32; CX 5 at 3. He testified that after a few days, the bump that he had previously detected on the inside of his knee appeared to be getting larger, and the pain persisted. TR 32. After two weeks, he sought treatment at EBC's Yard Hospital where an x-ray revealed the presence of large mass. TR 32; CX 3 at 2. Further medical investigation resulted in a diagnosis of a malignancy which required surgery that included a total left knee replacement. TR 33. He went out of work on October 9, 2003. CX 5 at 4. After the surgery, the Claimant underwent a course of chemotherapy which he was unable to tolerate, and he eventually was released to return to work in a light duty capacity on March 7, 2005, working 20 hours for the first week and resuming a regular schedule on March 14, 2005. TR 36-38. He needs a knee brace for stability due to tendon loss, and he was taking Oxycodone and Motrin for pain relief at the time of the hearing. TR 38. He is able to perform approximately 90 percent of his pre-injury duties, and he continues to be monitored for any recurrence of the cancer. TR 38.

B. Medical Evidence

Dr. Salkin's records indicate that his impression of the Claimant's post-surgical pain complaints was pes anserine tendonitis of the left knee. CX 4 at 3. On October 15, 2001, Dr. Salkin reported that the Claimant received no relief from a cortisone injection but had been improving over recent days. *Id.* at 5. In a final note dated November 13, 2001, Dr. Salkin stated that the Claimant had continued to improve and could resume work with no restrictions on December 10, 2001. *Id.* at 6. Dr. Salkin did not see the Claimant again until October 3, 2003. At that time, he said that the Claimant reported being "essentially pain free" until a recent new onset of left knee pain. CX 6 at 1. Dr. Salkin stated that an x-ray showed large lyptic lesion in

the proximal tibia, and he ordered an MRI study. *Id.* After the MRI, the Claimant returned to Dr. Salkin on October 9, 2003 when he was referred to another orthopedic specialist and placed on temporary total disability. CX 8 at 1.[2] In a November 12, 2003 letter to EBC's worker's compensation department, Dr. Salkin offered the following opinion:

> As you know, Mr. Caviggia is currently undergoing chemotherapy for treatment of a sacrcoma of his tibia. Although sarcomas are usually not work-related, I think in this case there is at least a work related aspect to it certainly given the timing and the relationship of his injuries to his complaints and previous surgeries. I hope you can accommodate him and continue his benefits. He remains on temporary total disability. I think it is unlikely that he's going to be able to return to his work at General Dynamics, at least in his present capacity.

CX 12 at 1. Dr. Salkin's letter was sent to EBC at the request of the Claimant's wife, Lorna Caviggia, who asked in a letter dated November 3, 2003 that the doctor send EBC "INFORMATION, WITH YOUR THOUGHTS OR OPINION, SUPPORTING THE FACT THAT THE TUMOR IN DANA'S BONE COULD (AT LEAST POSSIBLY) HAVE BEEN AN AFTER EFFECT OR COULD HAVE BEEN A RESULT FROM HIS WORK RELATED KNEE SURGERY IN AUGUST OF 2001." EX 19 at 72 (capitalization in original). Ms. Caviggia also stated to Dr. Salkin that an opinion that there was "EVEN THE SLIGHTEST POSSIBILITY" of a causal connection connection between the Claimant's cancer and his employment at EBC "WOULD BE MOST APPRECIATED AND VERY NECESSARY TO OUR NEED TO HAVE THIS COVERED BY WORKERS COMPENSATION. IT IS CRUCIAL THAT THIS BE SO FOR THE CONTINUED EMPLOYMENT OF DANA AND HIS RETIREMENT SAFETY!" *Id.*[3]

Dr. Salkin referred the Claimant to Gary E. Friedlaender, M.D., a professor of orthopedics and rehabilitation with the Yale Medical Group. EX 21. Dr. Friedlaender worte in his report that the Claimant gave a history of persistent, low level pain following the August 2001 surgery until a recent incident "when he banged his left knee on an object causing an increased pain and increase in the size of a small nodule that had been present over the past couple of years." *Id.* at 76. Dr. Friedlaender took a biopsy specimen of the nodule which was diagnosed as a high grade malignant sarcoma. *Id.* at 77; EX 8.

When the biopsy confirmed the presence of a malignancy, the Claimant was referred by to John R. Murren, M.D., an oncologist at the Yale University School of Medicine. The Claimant reportedly gave Dr. Murren a history that he was never free of pain after the August 2001 surgery, that he subsequently noticed a small nodule just below the surgical site which was stable until the summer of 2003 when it became painful and began to grow, and that he returned to Dr. Salkin after his knee gave out on September 14, 2003. CX 10 at 1. Dr. Murren's

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[2] According to the Claimant, Dr. Salkin advised him that his condition was "out of my league" when he decided on referral. TR 33.

[3] The letter from the Claimant's wife was addressed to four physicians – Drs. Salkin, Friedlaender, Murren and O'Brien. EX 19. Responses from Drs. Salkin and O'Brien were introduced by the Claimant. The record does not disclose whether Ds. Friedlaender or Murren ever responded.

assessment was a malignant fibrous histiocytoma ("MFH") of the left tibia for which he prescribed three cycles of chemotherapy prior to resection of the lesion, followed by six cycles of post-operative chemotherapy. *Id.* at 2. Dr. Murren did not address the cause of the Claimant's malignancy. However, Paul E. O'Brien, M.D., an oncology fellow at the Yale-New Haven Hospital who was working on the Claimant's case with Dr. Murren, provided the following opinion in a November 10, 2003 letter to EBC's worker's compensation department:

> Although the process of malignant fibrous histiocytoma is not completely known, there does appear to be a predilection for this particular type of tumor to form in scar tissue. There is anecdotal evidence of malignant fibrous histiocytomas developing from surgical scar tissue as well as from burn scar tissue or inflammatory scar tissue, which is described in standard cancer textbooks, including the sixth and current edition of *Cancer, Principles and Practice of Oncology* by DeVita, Hellman, and Rosenberg.
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> Given the emergence of the tumor at the site of the surgical scar, the persistence of pain at that site since soon after the date of surgery, and evidence to suggest that malignant fibrous histiocytoma forms in scar tissue, I believe that it is very highly possible that the growth of Mr. Caviggia's tumor was related to the presence of scar tissue formed after the surgery to perform the meniscus repair.

CX 11. Dr. Friedlaender, with the assistance of several other physicians, performed a resection of the sarcoma and total knee arthroplasty (hinged prosthesis) and patella tendon extensor reconstruction with skin grafting at the Yale-New Haven Hospital on February 2, 2004. CX 13 at 3-9. On January 25, 2005, approximately one year after the surgery, Dr. Friedlaender authorized the Claimant to attempt a return to work, initially on a part-time, light duty basis, in March. CX 15 at 1. There is no opinion on causation from Dr. Friedlaender in the medical records placed in evidence.

In an effort to counter the opinions of Drs. Salkin and O'Brien, EBC introduced a report from Kenneth A. Kern, M.D., a board-certified surgeon who is a clinical professor of surgery at the University of Connecticut School of Medicine and a Senior Attending Surgeon in general and oncologic surgery at the Hartford Hospital. EX 23, 24. Dr. Kern also noted in his report that he completed a two-year clinical and research fellowship in 1985-1987 at the National Cancer Institute with a primary focus on the oncologic treatment of soft tissue and bone sarcomas, and that he has "lectured, published papers, and written a book chapter on the management of patients with soft tissue and bone sarcomas." CX 23 at 83. Dr. Kern reviewed the medical records including the causation opinion letters sent by Drs. Salkin and O'Brien to EBC, and he concluded that "there is unequivocally no relationship between Mr. Caviggia's sarcoma and his work-related injury and subsequent arthroscopy." EX 23 at 81. He stated that he was "100%" certain that "there is no possibility that the development of the sarcoma was contributed to in any way by the occupational injury" because the Claimant's sarcoma did not arise at the site of his arthroscopy and rneniscus repair, but rather arose in the upper part of the tibia. *Id.* He added that he was "astounded" that medical experts would offer an opinion that "distant trauma resulted in the development of a sarcoma at a separate site" since the theory of distant trauma causing cancer, which arose from the belief that cancer was a bacteria similar to tuberculosis, was

debunked over 100 years ago. *Id.* at 82. Dr. Kern asserted that it is "critical in this case" to identify and understand the anatomic locations of the tumor and prior knee operations, stating,

> In essence, the tumor arose at a separate site from the knee surgery. The knee surgery was within the capsule of the knee joint, involving cartilage cushioning the knee during bending. The tumor arose within the large bone of the lower leg, far removed from the site of knee surgery. Furthermore, as will be discussed later in this letter, there was no chronic inflammation within the knee joint at the time of surgery to resect the tumor of the tibia.

Id. Dr. Kern continued that there is an extremely rare type of cancer that can result from chronic injury, such as a tissue injury festering over decades of chronically infected bone wounds, but he ruled out any chronic injury cancer in the Claimant's case because (1) the tumor and surgery were at different sites, and (2) there was no chronic injury within the knee joint. *Id.* He added that in the extremely rare cases in which a chronic injury cancer does occur, "the lag time is often decades, and the tissue type of the cancer is the same as the tissue injured" both of which were not present in the Claimant's case:

> In the case of Mr. Caviggia, the knee operation and cartilage repair involved skin and cartilage of the internal knee joint. Tumors possibly associated with chronic injury, such as burn wounds or chronically-infected wounds festering over decades, would involve the skin (squamous cell carcinoma) and cartilage (chondrosarcoma). It is not medically possible, to a 100% degree of certainty, that a MFH [malignant fibrous histiocytoma] of the proximal tibia would develop from the tissue types (skin and cartilage) manipulated during the arthroscopy and cartilage repair.

Id. Dr. Kern added that the pre-operative MRI study showed that the Claimant's sarcoma did not involve the covering surfaces of the internal knee joint, but instead arose below the knee joint in the tibia, that the biopsy performed by Dr. Friedlaender revealed no evidence for a tumor of cartilage or skin, that "additional immuno-histochemical markers were consistent with a tumor of connective tissue, and not consistent with a tumor of cartilage" and that the report of the February 2, 2004 resection and total knee replacement surgery stated there was "no involvement of tumor through the proximal surface of the tibia or into the joint capsule" which "indicates the tumor could not have arisen from the internal knee joint, including the cartilage repair performed 2 years previously." *Id.* at 85. According to Dr. Kern, MFH of the bone, while rare, has been extensively studied, and 15 percent of the reported cases involve the tibia with an average patient age of 50. *Id.* He stated that MFH of the bone has been associated in rare cases with long-standing foreign bodies adjacent to bone such as an artificial joint implant containing carcinogenic metals, or with chronic infection of the bone (osteomyelitis) that has festered or been refractory to treatment for years. *Id.* at 85-86. However, he stated that there was no evidence in the Claimant's case to support either of these two pathogenic processes as a cause for his MFH since the Claimant did not have an artificial joint, and he did not have any chronic injury to the tibia. *Id.* at 86. He further noted that "there is irrefutable evidence that Mr. Caviggia had no chronic injury even within the knee joint at the site of his surgery" in that "[t]he operative note at the time of tumor resection clearly describes the internal knee joint as

completely free of any chronic injury, and as normal in every regard." *Id.* Dr. Kern then addressed the belief of the Claimant and his wife that the cancer was causally related to the workplace injury and prior surgery:

> To a lay person an external separation of only inches between a surgical incision and a later problem may appear to indicate the same location internally. Anatomically however, in the area of the knee joint, the internal structures underlying a several inch separation are completely different. The knee joint and the tibia are two separate structures, and are separated by anatomic boundaries and different tissue types. Mr. Caviggia's tumor did not occur in the same site as his knee surgery, regardless of claims by the patient and his medical experts to the contrary.
>
> Clearly, Mr. Caviggia's prior knee surgery did not enter the tibia bone itself (i.e., the arthroscope was not inserted into the bone of the tibia), but was confined completely to the internal components of the knee joint itself. For this reason I can state with 100% certainty that it is anatomically impossible for the arthroscopy performed 2 years earlier to have initiated any chronic inflammation or "scarring" within the tibia bone. Based on anatomic considerations alone it is impossible for Mr. Caviggia's arthroscopy to have had any role in the development of his bone sarcoma.

Id.[4] In conclusion, Dr. Kern stated that it is clear that the Claimant developed an MFH of the tibia from an unknown cause, which is consistent with the overwhelming majority of other patients with the same disease. *Id.* at 87. In view of the fact that the Claimant had no chronic infection festering over years or an artificial joint to ascribe as the cause of tumor development, and the fact that the site of the prior knee surgery was anatomically and physically remote from the site of his bone tumor, Dr. Kern stated that it is his "opinion, stated to 100% degree of medical certainty in this case, that Mr. Caviggia's tumor was not work-related, nor was it contributed to by any occupationally-related activities, at any time." *Id.*

C. Admissibility of Claimant's Exhibits 11 and 12

EBC argues that the causation opinion letters from Drs. O'Brien and Salkin should be excluded because they do not satisfy the admissibility criteria established by *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). EBC Brief at 5. Initially, EBC points out that these opinions were provided in response to a "desperate plea" for help from the Claimant's wife, and it asserts that the court should consider the unusual context in which these opinions were solicited. *Id.* at 9. It further argues that Dr. O'Brien's opinion is fatally premised on a mistaken belief that the Claimant had persistent pain in his knee following the August 2001 surgery, an assumption that is contradicted by Dr. Salkin's October 3, 2003 note that the

[4] Dr. Kern appended an anatomical diagram of the knee joint and tibia in his report to illustrate his point that the Claimant's prior surgery and site of the MFH involved separate and distinct parts of the leg. EX 23 at 88-89.

Claimant had been "essentially pain free until recently." *Id.* at 10, quoting CX 6 at 1.[5] As for Dr. Salkin, EBC claims that he is an orthopedic surgeon who lacks adequate expertise to address the cause of the Claimant's MFH, noting that Dr. Salkin reportedly admitted to the Claimant that his cancer was "out of my league." *Id.* at 10, quoting the Claimant's trial testimony at TR 33.

The Benefits Review Board has held that an ALJ has "wide discretion to admit evidence relevant to discerning the parties' rights" pursuant to section 23(a) of the LHWCA which provides that common law or statutory rules of evidence are not binding on an ALJ. *Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147, 151-152 (1997). Thus, in determining whether to admit opinion evidence from a claimed expert, the ALJ is not bound by Rule 702 of the Federal Rules of Evidence or the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Id.* at 152; *Jones v. Aluminum Co. of America*, 35 BRBS 37, 40 n.4 (2001). *See also Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469 (7th Cir. 2001) (noting that in administrative law proceedings, unlike federal district court trials, the rules of evidence are relaxed because administrative tribunals believe that they have the skill needed to handle evidence that might mislead a jury). The difference between the treatment of expert evidence under the LHWCA and the Federal Rules of Evidence was dramatically illustrated in *Casey* where the Benefits Review Board held that the ALJ properly admitted the opinion of a claimed medical expert which had been excluded in a related civil trial by a district court pursuant to *Daubert* because the opinion was "relevant to a critical issue" in the LHWCA case. 31 BRBS at 152.

At the hearing, EBC's counsel acknowledged the BRB precedent on the applicability of *Daubert* in administrative hearings conducted under the LHWCA but countered that the Supreme Judicial Court of Massachusetts has applied *Daubert* to administrative hearings on worker's compensation claims. TR 11. *See Theresa Canavan's Case*, 432 Mass. 304, 309-310, 733 N.E.2d 1042, 1047 (2000). In *Canavan's Case*, the Court noted that state worker's compensation proceedings are governed by the same rules of evidence applicable to the courts of the Commonwealth, and it held that admission of expert testimony in a worker's compensation proceedings was, therefore, subject to the *Daubert* standards to the extent that *Daubert's* reasoning has been adopted under Massachusetts law. 733 N.E.2d at 1048. *See also Commonwealth v. Lanigan*, 419 Mass. 15, 26, 641 N.E.2d 1342, 1348-1349 (1994) (adopting *Daubert* in part). However, as discussed above, hearings on LHWCA claims are not governed by the FRE, but rather by the LHWCA and its implementing regulations which exempt statutory rules of evidence and mandate the admission of all relevant evidence. *See* 33 U.S.C. § 923(a); 20 C.F.R. § 702.338. Consequently, I conclude that *Canavan's Case* is distinguishable and that it would constitute reversible error under the BRB's reasoning in *Casey* to exclude the opinions from Drs. O'Brien and Salkin.

In light of the foregoing, I find that Dr. Salkin's board-certification in orthopedic surgery and Dr. O'Brien's qualification as an oncology fellow sufficiently qualifies them as experts for

[5] Contrary to Dr. Salkin's history, the Claimant reportedly told Drs. Friedlaender and Murren that he had persistent left knee pain from 2001 until 2003 which is consistent with his testimony at the hearing. EX 21 at 76; CX 10 at 1; TR 30-31. Resolution of this discrepancy in the evidence is not critical to the causation issue in view of my finding, *infra*, that Dr. O'Brien's opinion must me discounted due to a more serious error in his factual assumptions.

purposes of this proceeding. *See* 29 C.F.R. §§ 18.104, 18.702 (2004).[6] I further find that their opinion letters are relevant to the issue of causation in the case and, therefore, are properly admissible. Accordingly, EBC's objections to EX 11 and 12 are overruled. EBC's arguments regarding the credibility of the letters from Drs. O'Brien and Salkin will be considered in terms of the relative weight accorded to the doctors' opinions.

D. Causation

Section 20(a) of the LHWCA provides a presumption that a claim comes within its provisions. 33 U.S.C. § 920(a). The section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). To invoke the presumption, there must be a *prima facie* claim for compensation, to which the statutory presumption refers; that is, a claim "must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, OWCP*, 455 U.S. 608, 615 (1982). In this case, the Claimant has alleged that his MFH was causally related to the workplace injury of May 16, 2001 and the related surgery on August 6, 2001. This claim of a causal connection is supported by the medical opinions from Drs. O'Brien and Salkin. Based on this evidence, I find that the Claimant has satisfied his *prima facie* burden of establishing that he sustained physical harm and that conditions existed at his place of employment which could have caused or aggravated the harm. *See Kelaita v. Triple A. Machine Shop*, 13 BRBS 326, 331 (1981).

Since the Claimant has made the requisite *prima facie* showing of harm or pain and the existence of working conditions which could have caused or aggravated the harm or pain, EBC must overcome the force of the presumption by producing substantial evidence severing the presumed connection between the Claimant's MFH and his employment at EBC. *DelVecchio v. Bowers*, 296 U.S. 280, 286-287 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1981). Evidence is substantial if it is the kind that a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Under the substantial evidence standard, an employer need not establish another agency of causation to

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[6] Regarding use of experts, the Rules of Evidence applicable in ALJ proceedings, state,

> If scientific, technical, or other specialized knowledge will assist the judge as trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

29 C.F.R. § 18.702 (2004); and

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of paragraph (b) of this section. In making such determination the judge is not bound by the rules of evidence except those with respect to privileges.

29 C.F.R. § 18.104(a) (2004).

rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000). *See also Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 289 (5th Cir. 2003) (rejecting requirement that an employer "rule out" causation or submit "unequivocal" or "specific and comprehensive" evidence to rebut the presumption and reaffirming that "the evidentiary standard for rebutting the § 20(a) presumption is the minimal requirement that an employer submit only substantial evidence to contrary"); *Bath Iron Works Corp. v. Director, OWCP,* 137 F.3d 673, 675 (1st Cir. 1998) (under the substantial evidence standard, an employer does not have to exclude any possibility of a causal connection to employment, for this would be an impossible burden; it is enough that it produce medical evidence of "reasonable probabilities" of non-causation). For rebuttal, EBC relies on the medical report from Dr. Kern. I find that Dr. Kern's medical opinion clearly qualifies as substantial enough evidence to rebut the presumption of a causal relationship between the Claimant's MFH and his employment at EBC. Consequently, the presumption "falls out" of the case, and the Claimant bears the burden of establishing causation based on the record as a whole. *Del Vecchio*, 296 U.S. at 286-287.

I begin the weighing of the conflicting medical opinions with full appreciation of how the Claimant and his wife, an valuable advocate, could come to the sincere belief that the work-related knee injury and surgery in 2001 played a contributory role in the development of cancer two years later. Indeed, it would seem to be more than mere coincidence for an otherwise healthy man to develop a rare type of cancer in nearly the same part of his body where he suffered a prior traumatic injury that required surgical intervention. Yet, after carefully considering the medical opinions addressing the question of cancer causation, I conclude for the reasons outlined below that a preponderance of the evidence convincingly demonstrates that absence of any causal connection between the Claimant's cancer and his employment at EBC.

In terms of relative qualifications, Drs. O'Brien and Salkin both treated the Claimant which entitles their opinions to at least some deference under the law of the Second Circuit. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042 (2nd Cir. 1997) (opinion of a treating physician entitled to considerable weight); *Rivera v. Harris*, 623 F.2d 212, 216 (2nd Cir. 1980) (same). *See also Amos v. Director, OWCP*, 153 F. 3d 1051, 1054 (9th Cir. 1998), *amended* 164 F.3d 480 (1999), *cert. denied sub nom Sea-Land Service, Inc. v. Director, OWCP*, 528 U.S. 809 (1999); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998). *But see Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469 (7th Cir. 2001) (finding it "irrational" to accord greater weight to the opinion of a treating physician, who may not be a specialist, noting that "[t]reating physicians often succumb to the temptation to accommodate their patients (and their survivors) at the expense of third parties such as insurers, which implies attaching a discount rather than a preference to their views."). However, I find that the degree of deference to be given to the treating physicians in this case is not significant given the absence of any evidence in the record that either Dr. O'Brien or Dr. Salkin have the specialized training and experience in bone and soft tissue cancers possessed by Dr. Kern.[7] In any event, resolution of

[7] *Curricula vitae* were introduced for Dr. O'Brien or Dr. Salkin, and neither physician testified regarding their qualifications and experience. In this regard, it is noted that approximately three months before the scheduled hearing, the Claimant moved to remand his claim to the district Director on grounds that was unable to locate Dr. O'Brien and had insufficient time to generate evidence in rebuttal to Dr. Kerns' opinion. Administrative Law Judge

the confliction medical opinions need not turn on a comparison of medical credentials as the record provides a far more reliable and persuasive basis for according greater weight to Dr. Kerns' opinion on whether the Claimant's MFH was related to his workplace knee injury. Unlike Drs. O'Brien and Salkin who rendered their causation opinions in a few sentences shortly after the Claimant received his initial cancer diagnosis, Dr. Kern issued his detailed report after reviewing the complete body of medical evidence including the February 6, 2004 operative report which was unavailable to Drs. O'Brien and Salkin at the time that they wrote their letters to EBC in November of 2003. Aside from timing and a general anatomical proximity between the Claimant's knee injury and the MFH, Dr. Salkin offered no explanation for his opinion that there is a work-related aspect to the Claimant's cancer, and Dr. O'Brien's premise that the Claimant's MFH developed in surgical scar tissue had been shown to be clearly erroneous by Dr. Kerns's explanation, which is fully supported by the objective medical evidence, that the MFH developed outside of the knee joint in the Claimant's tibia and not in any part of the anatomy affected by the prior meniscus tear and corrective surgery in 2001. Therefore, I conclude that the Claimant has failed to establish by a preponderance of the evidence based on the record as a whole that his cancer arose out of and in the course of his employment at EBC.[8] Accordingly, his claim for benefits under the LHWCA for coverage of the medical care related to his cancer and disability compensation for time lost from work due to cancer-related treatment must be denied.

IV. Order

Based upon the foregoing Findings of Fact and Conclusions of Law, the claim of Dana J. Caviggia for benefits under the LHWCA for disability and medical care arising from his malignant fibrous histiocytoma is DENIED.

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge

Exhibit ("ALJX") 12. EBC objected to remand. ALJX 13. The ALJ then assigned to the matter, Colleen A. Geraghty, heard the parties' arguments on remand in a telephone motion conference, and found that EBC had timely served Dr. Kerns' report on the Claimant in accordance with the requirements of the pre-hearing order. Thus, Judge Geraghty determined that a remand was not warranted, but she allowed the Claimant a continuance of the hearing in order to afford him additional time to locate Dr. O'Brien and develop rebuttal evidence. ALJX 14. Thereafter, the case was reassigned to me, and I noted at the hearing that the Claimant had presented no compelling reason for reconsidering Judge Geraghty's denial of his motion for remand. TR 45-46.

[8] In determining that Dr. Kerns' opinion on causation is deserving of greater weight, I reject EBC's suggestion that Drs. O'Brien and Salkin's opinions should be discredited because they responded to a "desperate plea" from the Claimant's wife. It is a rare case where a medical opinion on a litigated issue is not furnished in response to a party's solicitation, desperate or otherwise. Moreover, the BRB has held that allegations of party affiliation, standing alone, do not establish improper bias and that medical reports prepared for litigation are not unusual and, absent evidence to the contrary, should be considered as equally reliable as other reports. *Brown v. Director, OWCP*, 7 B.L.R. 1-730, 1-732-733 (1985).